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No. 84-1514

In The
Supreme Court of the United States
October Term, 1984

THE STATE OF GEORGIA,
Petitioner,
vs.
FORT FRASER FELKER, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether, when a decision is rendered in a state appellate court on state constitutional grounds which meet or exceed federal standards, a federal question is presented.

2. Whether an appellate court may review the evidence presented in a lower court to determine whether probable cause standards have been met.

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The Respondent, Fort Fraser Felker, Jr., respectfully prays that the petition for a writ of certiorari to review the judgment of the Supreme Court of Georgia entered in this case on January 23, 1985 denying the Petitioner's application for reconsideration of its denial of Writ of Certiorari to the Court of Appeals of Georgia.

OPINIONS BELOW

The opinion of the Superior Court of Whitfield County, Georgia, is unreported; the opinion of the Georgia Court of Appeals is reported at 172 Ga. App. 492, 323 SE 2d 819 (1984); and the denial of application of Writ of Certiorari of the Supreme Court of Georgia will be noted in 253 Georgia Supreme Court Report.

JURISDICTION

The petitioner has alleged that this Court's jurisdiction is based on 28 U.S.C. § 1257 (c).

STATEMENT OF THE CASE

I. FACTS

The respondent herein, Dr. Fort Fraser Felker, Jr., is a physician licensed to practice medicine in the State of Georgia and registered under standards of the U. S. Department of Justice, Bureau of Narcotics and Dangerous Drugs, to possess "Schedule II controlled substances." Schedule II controlled substances include cocaine (O.C.G.A. § 16-13-26).

On January 20, 1984, Detective Bruce Jordan of the Whitfield County Sheriff's Department received a telephone call at home from an unidentified tipster, stating that "the subject you are looking for is at the airport and has the stuff you're looking for." (T.7). Jordan drove

his car to the Whitfield County Correctional Center, where he asked the dispatcher to radio Detective Ricky Swiney and picked up a patrol car. (Supp. Hearing T.32;T.6). He and his roommate then met Swiney and Sheriff Jack Davis, who had heard the radio message, at a parking lot at the intersection of Walnut Avenue and Airport Road. (T.6,7). They proceeded to General Aviation, a private business located approximately 11 miles from the Correctional Center. (T.7, Supp. Hearing T.29;T.7).

The policemen observed two vehicles parked in front of General Aviation, and noted that the office light was on, and saw no one in the building. (T.8). Jordan and Davis proceeded to the Dalton Municipal Airport, while Swiney remained behind the General Aviation building with Detective Charles Black, who had arrived at the business approximately fifteen minutes after the first policemen. Detective Black was having car trouble, and he and Swiney were using jumper cables in an attempt to restart his patrol car. (T.13-14).

Jordan telephoned his informant from the Dalton Municipal Airport. At that time, the tipster told him that the "subject" was Dr. Felker, the "airport" was General Aviation, and the "stuff" was cocaine, in an unknown amount. (Supp. Hearing T.24;T.8).

While Jordan and Davis were at the Dalton Municipal Airport, and Swiney and Black were behind General Aviation working to start Black's car, the two vehicles parked in front of the building left. (T.14). None of the officers saw the occupants of the cars, nor did they see who, if anyone, left the building. Swiney and Black continued to work on Black's car until it started, but when

they were unable to turn on its lights, Swiney gave Black the jumper cables and drove in the direction in which he had seen the two cars turn. (Supp. Hearing T.39). He caught up with two vehicles at an intersection near the parking lot where the policemen had met. (T.14). He then followed one of the vehicles, later identified as a tan Volkswagen Rabbit, and radioed Officer Donnie Lewallen, asking him to be on the lookout for the other, a brown Datsun 280Z (T.14-15).

Lewallen began surveillance of a brown Datsun 280Z some few minutes later, and followed it to a physician's office—that of Dr. Felker. He drove past the office and parked to watch the car, but did not see who left or entered the Datsun or the office. (Supp. Hearing T.45; T.22). He did notice a group of men gathered in front of the Creative Arts Guild rehearsal hall next door to the office. (T.20, 22). After a short time, the Datsun was driven away from the office. Lewallen again followed the vehicle, and, on Swiney's radioed orders stopped the car. (T.16, 23).

Swiney joined Lewallen almost immediately at the stop. At that time the driver of the car was first identified as being Dr. Felker. (T.17). Swiney asked permission to search the car, and, when consent was not given, undertook a search without consent. Sheriff Davis had arrived at the stop, as had Detectives Charles Hayes and Debbie Duvall. (T.17).

Dr. Felker at this time pulled a small vial containing cocaine from his pocket. He dropped the vial, picked it back up, and gave it to Swiney, explaining that it contained cocaine, that he was a doctor licensed to possess

cocaine, and that there was more cocaine at his office. The vial had became uncapped when it was dropped and residue had been blown onto Dr. Felker's clothing and onto the ground nearby. (Prelim. Hearing T.7; Supp. Hearing T.50;T.18-20).

Swiney formally placed Dr. Felker under arrest at this time, and had him transported to the Correctional Center. (T.18). Hhe called a County Magistrate, obtained a search warrant for Dr. Felker's office, and supervised a search of the office. Three brown glass containers labeled Cocaine Hydrochloride Merck" were found at the office (T.19); crime lab analysis showed these to contain or have contained cocaine, and order forms introduced into evidence by the State at the trial of the case showed legitimate, legal purchase and possession of same. (State's Exhibits Nos. 1 and 2).

After Dr. Felker's arrest, certain items were found on his person which, when tested by the State Crime Lab, were found to be "positive for cocaine." No items found in the automobile were shown to have contained cocaine; the "short straw" referred to by the Petitioner (T.18) was not even *sent* to the crime lab for testing, and was not introduced into evidence at trial. (State's Exhibit 1).

Various motions were filed by Dr. Felker through Counsel, including Motions to dismiss the indictment, quash the search warrant, and suppress all evidence gathered in an illegal search of the automobile. The motions were denied, and Dr. Felker was tried and found guilty of a violation of the Georgia Controlled Substance Act.

On appeal the Georgia Court of Appeals reversed the trial court's denial of the respondent's Motion to Sup-

press. The Supreme Court of Georgia denied certiorari; it is from this denial of certiorari that the Petitioner has now petitioned this Court for certiorari.

REASONS FOR DENYING THE WRIT

I.

No Federal Question Is Presented In This Matter.

The Constitution of the State of Georgia provides that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause. . . ." Const. Ga. Art. 1, § 1, Para. 13. On appeal, the Respondent cited this passage as grounds for his appeal, along with those of the Fourth Amendment to the United States Constitution. The Georgia Court of Appeals reversed the trial court judgment with reliance on *State v. Stephens,* 252 Ga. 181, 311 S.E. 2d 823 (1984), which Georgia Supreme Court opinion had construed and applied the new federal standard of *Illinois v. Gates,* — U.S. —, 103 S.Ct. 2317, 76 L. Ed.2d 527 (1983), as it would apply to and affect Georgia cases. The indictment came under a Georgia statute; Respondent's appeal was made on Georgia's constitutional grounds, and the Georgia Court of Appeals made its decision based on Georgia law.

This Court has often emphasized that State courts are free to set higher standards for protection of its citizens and greater restrictions on police powers, so long

as the standards set do not fall below federal constitutional standards. See *Michigan v. Moseley,* 423 U.S. 321, 96 S.Ct. 321, 46 L. Ed.2d 313 (1975); *Texas v. White,* 423 U.S. 67, 72, 96 S.Ct. 304 (1975); *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215 (1975); *Lego v. Twomey,* 404 U.S. 477, 92 S.Ct. 619, 30 L. Ed.2d 618 (1972). More recently, this Court dismissed as improvidently granted a writ of certiorari on the ground that the court below had rested its suppression decision on independent and adequate state grounds. *Florida v. Casal,* 462 U.S. 637, 103 S.Ct. 3100, 3103, 77 L. Ed.2d 277 (1983). A state search, in a state court, must adhere to state standards as well as federal standards. If state standards are more restrictive than the federal standards, a search and seizure not in compliance with the state standards must fall, even though it might meet threshold federal requirements.

The Georgia Supreme Court addressed this very question in *State v. Stephens,* 252 Ga. 181, 311 S.E.2d 823 (1984). There the court adopted the rule of *Illinois v. Gates* as the *outer limit* of probable cause, noting the subjectivity of the rule and urging a maximum indication of reliability for affidavits supporting a search.

In the present case, the Georgia Court of Appeals clarified the Georgia standard of probable cause. Citing the *Stephens* opinion, it has reasserted that the "totality of the circumstances" will determine probably cause or lack thereof, but has also provided the basis for an objective means of looking at the totality of circumstances. The court noted that cases decided under the Aguilar-Spinelli line of reasoning were *helpful* in reviewing a case, not *controlling.* The reasoning employed by the Georgia Court of Appeals affirms to Georgia law enforcement officials that, if Aguilar-Spinelli requirements are not met,

there must be something concrete in the circumstances surrounding a search and seizure to justify such police action. The rule of *Illinois v. Gates* must not be abused in such a way as to allow law enforcement officials to rely on hearsay, rumor and innuendo, rendering the Fourth Amendment useless. The Georgia Court of Appeals has ruled that, as to state cases, it will require something more than a nebulous feeling to justify a search and seizure. The Georgia Supreme Court, by denying certiorari, has agreed that the *Illinois v. Gates* rule, as applied to Georgia cases, will not be abused.

The Georgia Court of Appeals has, in fact, followed exactly the line of reasoning set out by this Court in *Illinos v. Gates*, — U.S. —, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), considering the Aguilar-Spinelli factors as "closely intertwined issues that may usefully illumine the commonsense, practical question whether there is "probable cause" to believe that contraband or evidence is located in a particular place." 103 S.Ct. at 2328.

II.

The Appellate Court Properly Reviewed The Decision Of The Trial Court To Prevent Misinterpretations Of Law And Abuses Of Discretion.

The Petitioner herein has submitted to this Court that the Court of Appeals of the State of Georgia erred by refusing to agree with the trial court's finding of probable cause. It is settled that the function of an appellate court is to review decisions of lower courts, correcting errors of law and ensuring that parties are afforded basic protections of the law. In this matter, the Georgia Court

of Appeals has fulfilled this function setting out and clarifying the law relating to probable cause, applying the facts of the case to the law, and rendering a decision in conformity thereto. When the trial court's finding of probable cause is erroneous, the appellate court's duty is to correct its error.

CONCLUSION

This case was properly decided in the court below and is not an appropriate case for the granting of certiorari by this Court. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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